September 15, 2004

Response to Public Comments
Final National Pollutant Discharge Elimination System (NPDES)
General Permit No. CAG280000 for Offshore Oil and Gas Exploration, Development and Production Operations off Southern California.

Public notice of EPA's tentative decision to issue the general permit was published in the Federal Register on April 8, 2004 (69 Fed. Reg. 18570) and in the Santa Barbara News-Press on April 15, 2004. The following parties submitted written comments on the proposed general permit within the public comment period which closed on May 15, 2004:

Senator Barbara Boxer
Congresswoman Lois Capps
Western States Petroleum Association (WSPA)
County of Santa Barbara
Environmental Defense Center and Environmental Advocates on Behalf of:
Get Oil Out!, Santa Barbara ChannelKeeper, Sierra Club Los Padres Chapter,
Citizens for Goleta Valley and Our Children's Earth

The written comments which were submitted were reviewed by EPA and considered in the formulation of the final determinations regarding the proposed general permit. Our responses to the comments follow below. In addition, EPA has prepared a separate supplemental response to the California Coastal Commission staff report that we received in March 2004.

1) Comment: For produced water discharges, several commenters objected to the proposal to apply California Ocean Plan (COP) objectives at the boundary of state waters rather than at the edge of the 100-meter mixing zone as EPA had agreed to do at a public meeting conducted by the California Coastal Commission (CCC) in 2001. A commenter also contended that the COP requires compliance at the edge of the 100-meter mixing zone, even for discharges beyond state waters. At the public meeting in 2001, EPA agreed to include in the permit the more stringent of EPA water quality criteria or COP objectives applied at the edge of the 100-meter mixing zone. Commenters also noted that the CCC objected under the Coastal Zone Management Act (CZMA) at a March 17, 2004 public meeting to EPA's consistency certification for the permit proposed in April, 2004. On December 10, 2003, EPA had submitted its consistency certification to the CCC that the proposed permit was consistent with the California Coastal Management Program (CMP).

Response: EPA has decided to issue the final permit to require each permittee to sample its produced water discharges for certain, specified constituents in order to determine whether the discharges cause, have the reasonable potential to cause, or contribute to an exceedance above

the applicable water quality criteria. For purposes of this reasonable potential study, for those constituents for which both EPA and California have adopted criteria, the permit requires the reasonable potential submittal to be based on the more stringent of the Federal criterion and the COP criterion applied at a point of compliance 100 meters from the facility's point of discharge.

EPA is including this requirement in the general permit as a consequence of the CCC's March 17, 2004, objection to EPA's proposed permit, in order to implement the permit as expeditiously as possible. Under the permit proposed in April 2004, it is possible that the permit would not become effective for a particular discharger until after a considerable delay (as long as two to three years) because each discharger would need to seek and obtain concurrence from the CCC with its individual consistency certification before the permit can be effective for that discharger. See 15 C.F.R 930.31(d). If the CCC objected to a discharger's consistency certification, the discharger could appeal the objection to the Secretary of Commerce. See 15 C.F.R. Part 930, Subpart H. Because of the potential time delay involved, during which time the new permit's requirements would not be in effect, EPA is not finalizing the approach proposed in April 2004.

Instead, EPA is issuing the permit as a "license" under the CZMA and incorporating the conditions requested by the CCC in order to make the permit effective and implement the permit's controls as soon as possible. The CZMA prohibits Federal agencies from granting a license or permit that is subject to the CZMA consistency certification requirement until the State has concurred with the certification. CZMA § 307(c)(3). Even though EPA continues to believe the permit proposed in April 2004 was fully consistent with the enforceable policies of the CMP (as described in more detail below), the CCC's objection to EPA's consistency certification effectively prevented EPA from issuing the permit under CZMA section 307(c)(3). And, as stated above, EPA is concerned that issuing the permit under CZMA section 307(c)(1) (as EPA proposed on April 8, 2004) with a delayed effective date will result in considerable delay in implementing the new permit. Moreover, issuing the permit under CZMA section 307(c)(3) is consistent with EPA's long-standing practice and with the NOAA regulations (15 CFR 930.31(d)). Therefore, EPA is including the requirement requested by the CCC in order to issue the permit now, and ensure that the environmental benefits of the new permit are achieved as soon as possible.

In particular, the permit implements technology-based effluent limitations for conventional, non-conventional, and toxic pollutants based on EPA's effluent guidelines promulgated in January 1993 and EPA wants to avoid any further delay in achieving the environmental benefits of these effluent limitations. 58 Fed. Reg. 12504 (March 4, 1993). The final general permit offers substantial improvements over the present discharge requirements for the 22 platforms because it incorporates the more stringent 1993 EPA effluent guidelines. For example, the 1993 guidelines reduce allowable discharges of oil and grease in produced water to 42 mg/l (daily maximum) and 29 mg/l (monthly average); by comparison the existing general permit only includes a daily maximum limit of 72 mg/l. Moreover, the permit includes toxicity testing requirements using species indigenous to California marine waters. This serves as a

safety net for ensuring protection of marine life in California waters.

Although EPA is including the conditions requested by the CCC in order to issue and implement the permit expeditiously, EPA disagrees that the CMP or the CZMA require the platform discharges to comply with the COP criteria at the point of discharge. The CCC asserts that its practice is to require compliance with the CMP policies and standards, including the COP criteria, at the site of an activity under review, even if that activity occurs beyond the boundary of state ocean waters. The CCC then concludes that any limitations on its authority to enforce the COP criteria under state law do not limit its authority under the CZMA to require compliance with the enforceable policies of the CMP. See Staff Report and Recommendation on Consistency Determination, California Coastal Commission, March 3, 2003, at 23-24.

However, the CCC fails to explain how the CZMA provides authority for the State to require compliance with its water quality standards in waters outside the State's jurisdiction, absent a showing that the permitted activity would have reasonably foreseeable effects on the state's coastal uses or resources at the point of discharge in federal waters. The CZMA does require that a federal license or permit activity, regardless of its location, with reasonably foreseeable effects on any coastal use or resource must be consistent with the enforceable policies of federally approved state CMPs. The CZMA requires a federal agency to obtain the State's concurrence with the agency's determination that any such proposed federal license or permit activity is in fact consistent with the enforceable policies of the approved State CMP. CZMA § 307(c)(3).

The CZMA defines "coastal zone" to extend only to the seaward limit of State title and ownership (in this case three miles from shore). CZMA § 304(1); 16 U.S.C. § 1453, 43 U.S.C. § 1312. Regulations implementing the CZMA define "enforceable policy" to mean "State policies which are legally binding ... by which a State exerts control over private and public land and water uses and natural resources in the coastal zone," and which are incorporated in an approved State coastal management plan. 15 C.F.R. 930.11(h) (emphasis added). Without the State's concurrence, the federal agency cannot grant a license or permit (with certain limited exceptions). CZMA § 307(c)(3). Thus, a state's enforceable policies apply to activities in federal waters through the federal consistency provision of the CZMA; however, the CZMA does not extend state jurisdiction or direct state regulatory authority into areas outside a state's jurisdiction.

The purpose of the federal consistency provisions in the CZMA is to ensure that federally licensed activities that have reasonably foreseeable effects on a State's coastal zone are conducted in a manner that is consistent with the State's coastal management plan. Thus, while EPA agrees that the federal consistency provisions of the CZMA do apply to licenses for activities outside state waters, such as those addressed by today's General Permit, if it is reasonably foreseeable that such activities will affect the uses or resources of the State's coastal zone, EPA disagrees that the CZMA authorizes California to require that dischargers in federal waters comply with the COP criteria at the point of discharge, unless it is shown that such compliance is necessary to avoid effects on those coastal uses and resources protected by the

COP . In this case, the CCC has not provided any information to support such a showing.

By including the provision requested by the CCC, the issue of the CCC's concurrence with EPA's consistency certification has been resolved. The CCC Executive Director confirmed in a letter to EPA dated July 19, 2004, that the January 2001 CCC concurrence is still valid as long as EPA includes in the permit and the addendum to the fact sheet all the conditions which it agreed to in 2001, which EPA has done.

2) Comment: A commenter argued that the permit should guarantee funding for third party monitoring of platform discharges, possibly including requirements for EPA itself in the permit. The commenter pointed out that in 2001 EPA had committed to third party monitoring for the term of the permit, and that EPA intended to continue this commitment with the 2004 proposed permit. The commenter also objected to EPA's proposal to bring the permit before the CCC again under 15 CFR 930.65(b) if EPA is unable to follow through on this commitment. The commenter noted that 15 CFR 930.65(b) applies to consistency certifications which are submitted for permits or licenses rather than for Federal agency actions under 15 CFR 930.31(d). The commenter also characterized industry's offer in 2000 to help fund laboratory costs as "very limited" and not sufficient to be effective.

Response: In 1989, EPA and the Minerals Management Service (MMS) entered into an MOA which provides that MMS will conduct certain inspection and sampling activities for EPA at offshore oil and gas facilities. EPA believes that the inspection and sampling activity which is conducted by MMS for EPA is sufficient to address the concerns of the commenter regarding an independent assessment of the compliance status of the offshore facilities.

EPA would also point out that self-monitoring of discharges is authorized by section 308 of the Clean Water Act (CWA) and is a standard provision of all NPDES permits issued across the country. A permit requirement for third party monitoring as recommended by the commenter was omitted from the final permit because it is simply not consistent with the provisions and authorities provided by the CWA. In fact, such a requirement would be unique. EPA has found self-monitoring to be an effective and efficient tool for determining compliance with permit requirements and for ensuring proper operation of pollution control facilities. EPA does not have the resources to conduct all the routine monitoring required by NPDES permits. Also, since EPA is the permitting authority, EPA believes it would be inappropriate for the permit itself to include requirements for EPA, such as that EPA guarantee third party monitoring.

Under the MOA with MMS, each year a workplan is prepared which sets forth the activities to be conducted by MMS for EPA. The workplan for FY 2004 includes the following activities:

- sampling of produced water at nine platforms
- drilling mud sampling upon request by EPA
- records inspections at all platforms

In addition, in response to concerns which have been raised regarding possible Federal furloughs in the future, the FY 2004 workplan provides that EPA will request the California Central Coast Regional Water Quality Control Board to conduct the inspection and sample collection activities if EPA and MMS are unable to do so.

In its December 2003 consistency certification submittal to the CCC, EPA noted that the level of oversight activity provided by the FY 2004 workplan is comparable to the oversight provided by the FY 2001 workplan. Since the CCC had concurred in 2001 that this level of activity was consistent with the California CMP, EPA believes that the FY 2004 workplan would also be consistent. In addition, EPA believes that this level of activity is sufficient to address the concerns of the commenter. EPA also anticipates a similar workplan to be developed for FY 2005.

As noted above, the commenter pointed out that the reference to 15 CFR 930.65(b) applies to Federal permits and licenses rather than Federal agency activities and that EPA had submitted its consistency certification as a Federal agency activity. However, EPA is now issuing the final general permit as a "license" and thus the reference to 15 CFR 930.65(b) is correct for the final general permit.

Lastly, the commenter had argued that the offer from industry to assist with funding for sample analysis may be insufficient to be effective. In response, it is EPA's intent to fund all the sample analysis itself and EPA believes it will be able to do so. Further, EPA would disagree with the commenter that industry's commitment would be characterized as "very limited" since it does cover all the parameters found in Table 4 in Part II.B.1 of the permit, except for toxicity, and for oil and grease which is also regulated by the permit.

3) Comment: A commenter pointed out that in 2001 EPA had committed to present the results of certain discharge alternatives studies to the CCC three months after completion and to modify the permit within one year if the discharge alternatives were determined to be feasible. The studies would consider the feasibility of alternatives to discharge such as barging of muds to shore and reinjection of produced water. However, the commenter objected that these commitments were not actually in the permit as requirements for EPA. The commenter did recognize that it may be inappropriate for EPA to impose permit requirements upon itself. Given this concern, the commenter suggested as an alternative that the studies be submitted to EPA and the CCC, and to require permit modification if the alternatives prove to be feasible. In addition, as with third party monitoring discussed above under Comment #2, the commenter objected to EPA's proposal to bring the permit before the CCC again under 15 CFR 930.65(b) if EPA does not follow through on this commitment.

Another commenter argued that any permit modifications stemming from the results of the discharge alternatives studies should be based on the requirements of the CWA rather than the California CMP. This commenter noted that EPA had evaluated discharge alternatives in the development of the effluent limitations guidelines for the industry (40 CFR Part 435) and that

permit limits should be based on economic viability and best available technology as contemplated under the CWA.

Response: EPA believes that it would be inappropriate for the permit to include requirements for EPA since EPA is the permitting authority. Accordingly, the final permit does not include the requirements recommended by the commenter for EPA itself. With regards to the suggestion that the studies be submitted to EPA and the CCC, EPA will provide CCC staff with copies of the studies when they become available. EPA will also consider comments from CCC staff concerning the results of the studies and whether permit modification would be appropriate; however, EPA will make the final decision since EPA is the permitting authority.

The commenter had also expressed concern that the proposed permit only provides that the permit *may* be modified (rather than *will* be modified) if the discharge alternatives prove to be feasible. EPA believes the recommended revision is reasonable, and the final permit provides that if EPA determines that the discharge alternatives are feasible, the permit *will* be reopened and modified as appropriate.

As noted above, the commenter pointed out that 15 CFR 930.65(b) applies to Federal permits and licenses rather than Federal agency activities and that EPA had submitted its consistency certification as a Federal agency activity. However, EPA is now issuing the final general permit as a "license"; thus the reference to 15 CFR 930.65(b) is correct.

EPA disagrees with the commenter who argued that requirements of the California CMP were not appropriate to consider in evaluating the results of the discharge alternatives study. At the January 2001 hearing, the CCC raised the concern that the discharge alternative study should be assessed under the CMP's definition of feasibility. EPA agreed because the discharges at issue could foreseeably affect state coastal resources, and EPA therefore has a responsibility under the CZMA to ensure that the permitted activity is consistent with the California CMP. Accordingly, EPA agreed to include a provision in the permit requiring permittees to "submit to EPA a study or studies to determine the feasibility, as defined in the California CMP, of disposal of drill muds and cuttings and produced water by means other than discharge into ocean waters..." Moreover, the feasibility of the studies does not need to be assessed at a particular geographic point (e.g., 100-meter or state-federal boundary). The definition of "feasible" in the California Coastal Act is not limited to any particular location; it states that "'feasible' means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." Cal. Pub. Resources Code 30108 (2004).

By contrast, the COP criteria do have a geographic limitation, as explained in detail in EPA's March 15, 2004 letter to the CCC. As we stated then, under Section C of the COP, the COP applies to the "ocean waters" as defined in Appendix I. "Ocean waters" are then defined as "territorial marine waters of the state," which are waters within the 3-mile limit. The definition of ocean waters further states that: "If a discharge outside the territorial waters of the State could

affect the quality of waters of the State, the discharge may be regulated to assure no violations of the Ocean Plan will occur **in** ocean waters." (emphasis added.). Accordingly, proposing the point of compliance at the state-federal boundary is consistent with the CMP and there is no legal requirement to assess the COP criteria at the 100-meter point. However, EPA is including the 100-meter point for COP criteria in the final permit in order to expedite the effective date of the permit, as explained in the Federal Register notice and final addendum to the fact sheet.

EPA also notes that the California Coastal Act's definition of feasibility is not inconsistent with commenter's concern that permit limits should be based on economic viability and best available technology, since the definition takes economic and technological factors into account.

4) Comment: EPA had proposed to modify the test method for mercury in barite to require use of an EPA test method for solid wastes, given that barite is a solid material. The permit requires testing for cadmium in barite as well, and a commenter recommended that the permit also require use of an EPA solid waste test method for cadmium in barite. The commenter noted that EPA has recently approved solid waste test methods for mercury and cadmium in barite for operations in the Gulf of Mexico.

Response: EPA agrees that this is a reasonable request and the final permit includes a requirement to use an EPA test method for solid wastes for cadmium as well as mercury. The test method for cadmium in the final permit is method 3050B followed by 6010B as described in the EPA publication SW-846, entitled "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods."

5) Comment: A commenter pointed out that for 2,4-dimethylphenol, the proposed permit had not included EPA's most recent update to its water quality criteria. Table 4 of the proposed permit had specified a water quality criterion of 2,300 ug/l for 2,4-dimethylphenol. The commenter noted that the updated criterion is 850 ug/l as specified in the EPA document entitled "National Recommended Water Quality Criteria," EPA 822-R-02-047, November, 2002.

Response: EPA agrees that the correct water quality criterion for this parameter is 850 ug/l. Table 4 of the final permit, and Table 2 in the Addendum to Fact Sheet have been corrected.

6) Comment: A commenter noted that Table 4 of the proposed permit cited 63 Fed. Reg. 68354 (December 10, 1998) as the source of the EPA water quality criteria. The commenter pointed out that this source is outdated.

Response: EPA agrees that the source is outdated and it has been removed from Table 4 of the final permit. The final Addendum to Fact Sheet provides references for the sources of the latest EPA water quality criteria.

7) Comment: A commenter contended that the requirements of Part III.A of the proposed permit related to "minimum level" (ML) and "method detection level" (MDL) are not applicable to some of the permit monitoring requirements including the static sheen test, the drilling fluids toxicity test, produced water toxicity tests, and the oil and grease tests for produced water and well treatment, completion and workover fluids. The commenter requested a clarification of this matter.

Response: EPA agrees that the requirements of Part III.A regarding ML and MDL are not applicable to the some of the monitoring requirements in the permit (since an ML and MDL are not specified in the test procedure), including the static sheen test, the drilling fluids toxicity test and produced water toxicity tests. However, ML and MDL requirements are appropriate for the oil and grease tests; the EPA document which describes test method 1664 for oil and grease (EPA-821-R-98-002) does provide information concerning ML and MDL for the test method. The final permit has not been modified per the above; the commenter in discussions with Region 9 considered this clarification to be sufficient.

8) Comment: A commenter argued that the requirements of Part I.A.6.a for exploratory drilling operations (not conducted on a platform) are inconsistent with the requirements on page 2 of the permit concerning the permit effective date for the exploratory operations. The commenter was concerned that the permit may require two reviews by the CCC of future exploratory operations, one at the time the exploration plan is submitted and a second review at the time NPDES permit coverage is requested. The commenter also noted an inconsistency between Part I.A.6.a of the permit which requires a notice of intent 30 days before initiation of discharges and page 2 of the permit in which the permit effective date would immediately follow resolution of CZMA consistency.

Response: The requirements on page 2 of the proposed permit for exploratory operations have been removed now that the permit will be effective on December 1, 2004. As such, the inconsistency noted by the commenter no longer exists. The final permit does retain the requirement of Part I.A.6.a which requires that the notice of intent for exploratory operations be submitted at least 30 days prior to initiation of discharges. The permit also retains the requirement that the permittee obtain all applicable approvals of the exploration plan from the Minerals Management Service and the CCC.

9) Comment: Since the CCC objected to EPA's consistency certification for the general permit proposed in April, 2004, that permit could not have been utilized by the various platform operators until the CZMA consistency would have been resolved individually for each platform (15 CFR 930.31(d)). Pages 1 and 2 of the permit and section A.5 of the Addendum to Fact Sheet made available in April 2004 discussed a number of scenarios under which the CZMA consistency issue could have been resolved and the new permit would have gone into effect. They also described that in the interim, the existing general and individual NPDES permits for the platforms would remain in effect. A commenter objected to what the commenter characterized as the extension of the existing permits in this manner, and raised a number of

issues related to this matter (discussed in A through F below).

Response: EPA responds to these comments below, but notes that many of the issues raised by these comments have been addressed by EPA's final general permit, specifically by EPA's decision to issue the general permit and make it effective on December 1, 2004. As described in the Federal Register notice of final permit issuance, the CCC has concurred with EPA's determination that the final permit is consistent with the California Coastal Management Plan. On the effective date of the new general permit, the expired general and individual permits that cover the 22 platforms will no longer be in effect.

(A) The commenter first argued that EPA lacks the authority to extend one permit via a second permit. Assuming EPA is using the Administrative Procedure Act (APA) as the basis for the extension, the commenter recommended that the new permit omit any mention of the extension since the APA operates automatically and not by any action by EPA. The commenter also argued that under section 558(c) of the APA, once EPA issues the new general permit, the life of the existing permits cannot be extended further. The commenter noted that section 558(c) provides that permits may be extended only "until the application has been finally determined by the agency."

Response: The final general permit does not contain the effective date provision the commenter claimed was an impermissible exercise of EPA's authority to continue expired permits. The previous administrative continuance of the expired permits resulted from the operation of the Administrative Procedure Act, without any action taken by EPA. However, as of the effective date of the final general permit, the previous permits are no longer in effect.

In accordance with 40 CFR 122.6, an expired permit remains in effect until the effective date of a new permit. The commenter appears to be arguing that the issuance date for the new general permit would be date that the "application has been finally determined by the agency" pursuant to section 558(c) of the APA, and that permit extensions beyond that date would not be allowed. However, 40 CFR 122.6 provides that under section 558(c) of the APA, expired permits remain in effect until the effective date of the new permit, not the date of issuance of the new permit as argued by the commenter.

NPDES regulations at 40 CFR 124.15 also provide flexibility in determining an appropriate effective date for a new permit. The effective date is often set 30 days after the final permit issuance date in accordance with 40 CFR 124.15(b), but a later effective date may be specified pursuant to 40 CFR 124.15(b)(1). Here, EPA has set the effective date as December 1, 2004 which is the first day of the month that begins at least 45 days after the Federal Register notice of permit issuance, which will provide additional time for the permittees to implement the new permit conditions.

(B) The commenter argued that for a number of reasons, EPA cannot reissue the existing permits in their current form. The commenter recognized that this did not appear to be EPA's

intent, but nevertheless felt it was important to comment on this matter. The commenter noted that if EPA were to modify the expiration dates of the existing permits (and thereby extend the terms of the permits), EPA would have to provide public notice of a modification of a permit's expiration date. The commenter also noted that section 402(b)(1)(B) of the CWA limits the terms of NPDES permits to five years.

Response: The final general permit does not contain the effective date provision the commenter claims would result in an impermissible re-issuance of the expired permits. Even though the commenter's concerns have been addressed in the final general permit, EPA notes that the D.C. Circuit upheld EPA's regulatory administrative continuance provision in Natural Resources Defense Council, Inc. (NRDC) v. U.S. EPA, 859 F.2d 156, 162 (D.C. Cir. 1988). There, the court noted that NPDES permits have five-year terms, and "[a]bsent some mechanism for continuance, each source owner operating under an expired permit would be in violation of the Act and subject to enforcement actions and penalties . . . The risk that such delays might halt the operations of innocent permittees in violation of Congress's intention is not unique to environmental regulation and was in fact recognized by the writers of the APA." The court explained that the APA provides a "general solution" to this situation and cited 5 U.S.C. 558(c), which states:

> When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

The court noted that EPA promulgated a regulation addressing the application of Section 558(c) of the APA to NPDES permits, 40 C.F.R. 122.6(a), which provides that "[w]hen EPA is the permit-issuing authority, the conditions of an expired permit continue in force under 5 U.S.C. 558(c) until the effective date of a new permit . . . if:

> (1) The permittee has submitted a timely application . . . which is a complete . . . application for a new permit; and
>
> (2) The Regional Administrator, through no fault of the permittee does not issue a new permit with an effective date . . . on or before the expiration date of the previous permit (for example, when issuance is impracticable due to time or resource constraints).

Id. at 163 (citing 40 CFR 122.6). In the NRDC case, Plaintiff NRDC challenged the EPA's authority to approve continuances of expired permits under the CWA and APA through the regulation at 40 CFR 122.6. The D.C. Circuit rejected the challenge, relying on the Supreme Court's decision in Pan-Atlantic Steamship Corp. v. Atlantic Coast Line Railroad Co., 353 U.S. 436 (1957), where the Supreme Court relied on the APA "to protect a person with a license from the damage he would suffer by being compelled to discontinue a business of a continuing nature .

. ."

The D.C. Circuit held that, similarly, without a similar extension of authority, any industrial operation requiring an NPDES permit, no matter how important or essential that operation may be, would be brought to a halt regardless of the harm to the permittee or the public. NRDC. v. U.S. EPA, 859 F.2d at 171. The court noted that both in cases, Pam-Atlantic Steamship and NRDC, the expired permit is continued, not by affirmative agency action, but by operation of law. "We conclude that EPA's recognition of this result is entirely proper." NRDC v. U.S. EPA, 859 F.2d at 173.

Here, the new general permit will become effective on December 1, 2004. At that time, the expired individual and general permits will no longer be in effect.

(C) The commenter noted that most existing permits lack effluent limitations based on "best available technology economically achievable" (BAT), and that the 1989 CWA deadline for such limits has passed. The commenter argued that the existing permits could not be reissued without such limits.

Response: EPA is not reissuing the existing permits and such permits will no longer be in effect after December 1, 2004 which is the effective date of the new general permit. The final general permit contains BAT limitations based on the effluent limitations guidelines promulgated by EPA on March 4, 1993 (58 Fed. Reg. 12454) for the Offshore Subcategory of the Oil and Gas Extraction Point Source Category. These regulations establish BAT effluent limitations for drilling muds and cuttings, produced water, produced sand, well treatment, completion and workover fluids, deck drainage, and sanitary and domestic wastes.

(D) The commenter argued that existing permittees could not have applied for renewal of permit coverage under the general permit in 1984 since current regulations which govern notices of intent (NOIs) had not yet been promulgated. In addition, the commenter argued that 40 CFR 122.6 and 122.21 would require a complete individual permit application for an extension rather than an NOI requesting extended coverage. The commenter further contended that EPA has no authority to extend general permit coverage, and cited a case, Kitlutsisti v. Arco Alaska, Inc., 592 F. Supp. 832 (N.D. Alaska 1984) in support of this contention.

Response: The regulations which provide for the issuance of general NPDES permits were first promulgated by EPA on June 7, 1979 (44 Fed. Reg. 32854). These regulations did not specify how a potential permittee would apply for discharge authorization under a general permit. On April 2, 1992, EPA promulgated regulations which set forth requirements for applying for permit coverage under a general permit (57 Fed. Reg. 11394).

General permits issued prior to April 2, 1992, including Region 9's general permit for offshore oil and gas facilities, generally required the submittal of an NOI requesting permit coverage by permit applicants. The NOI information requirements were established on a case-

by-case basis based on the nature of the facilities to be permitted. Given the absence of other guidance on this matter, EPA considers this to have been a reasonable course of action. Since an NOI was the accepted means of seeking permit coverage under a general permit in the 1980s (and still is today), EPA also believes that the NOIs requesting extended permit coverage under the general permit in 1984 were appropriate.

EPA disagrees with the commenter that a complete individual permit application would have been necessary to request extended permit coverage in 1984 under the general permit. NPDES regulations at 40 CFR 122.21(a) and 122.21(e) provide that complete permit applications are required for permittees other than those covered by general permits. In fact, when these regulations were promulgated in 1983, they stated that a complete application was not necessary for a general permit:

> 122.21(a): *Duty to apply*: Any person who discharges or proposes to discharge pollutants and who does not have an effective permit, except persons covered by general permits under 122.28 . . . shall submit a complete application . . . to the Director . . .
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> 122.21(e): *Completeness:* The Director shall not issue a permit before receiving a complete application for a permit except for NPDES general permits.

(48 Fed. Reg. 14146, 14159)(April 1, 1983)(emphasis added). Therefore, EPA believes that the NOIs requesting extended coverage were appropriate for the general permit.

EPA also disagrees with the commenter that EPA has no authority to grant extended permit coverage under general permits under the APA. This issue was reviewed by EPA in a memorandum dated November 17, 1983. See Appendix C in the EPA guidance document entitled "General Permit Program Guidance" dated February, 1988. The memorandum concludes that EPA does have the authority to grant extended permit coverage under the APA in the case of general permits.

The Program Guidance noted above for general permits also addresses the case cited by the commenter *(*Kitlutsisti v. Arco Alaska, Inc.). The Program Guidance notes that the case was appealed and that EPA had issued the general permit in question by the time of the appeal. Since the issue had been resolved, the Ninth Circuit Court declared the case moot and vacated the District Court's decision on the matter. EPA therefore considers the case to be of limited precedential value, and EPA maintains its position that general NPDES permit coverage may be extended under the APA.

(E) The commenter argued that existing permit applications for extended permit coverage under the APA lack adequate information needed to establish effluent limits under section 301(b)(1)(C) of the CWA, which requires water quality-based effluent limitations (WQBELs) based on applicable water quality standards. The commenter contended that the

applications should be considered incomplete as a result. The commenter also argued that the proposed permit impermissibly lacks effluent limitations required by section 301(b)(1)(C). The commenter suggested that EPA should have used its authority under section 308 of the CWA to gather appropriate effluent data for the development of WQBELs. In addition, the commenter recommended WQBELs for all toxic pollutants suspected in the discharges immediately.

Lastly, the commenter was unclear whether Part I.B.1.f.1 of the proposed general permit was intended to extend to the terms of existing permits, or whether the requirements of this Part were intended to be permit conditions of the new general permit. Part I.B.1.f.1 of the general permit imposes WQBELs from the existing permits while additional data are gathered for the development of updated WQBELs. The commenter also recommended that the general permit include the WQBELs from the previous permits, rather than just refer to them.

Response: EPA disagrees that the applications should be considered incomplete for the reason noted by the commenter. NPDES regulations at 40 CFR 122.21(e) provide that permit applications are considered complete when they are completed to the satisfaction of the director of the NPDES program. EPA's guidance manual for developing WQBELs for toxic pollutants entitled "Technical Support Document for Water Quality-Based Toxics Control" (EPA/505/2-90-0001) recognizes that in some cases sufficient data may not be available in a permit application to develop appropriate WQBELs at the time of permit issuance. One suggested means of addressing this matter is to require monitoring in the permit and include a permit reopener to establish additional effluent limitations as appropriate during the term of the permit. This is the procedure that EPA is following for the general permit and EPA believes it is reasonable and consistent with applicable regulations and guidance. The final permit also includes an expeditious schedule for the reasonable potential study; the final permit shortens the data gathering phase from 2½ years as proposed in the July, 2000 permit to one year for the final permit. An alternative would be the use of EPA's authority under section 308 of the CWA as the commenter suggested. However, either approach would require about the same amount of time to gather the data; as such, EPA believes there is no real advantage to the commenter's recommendation.

Regarding the alleged lack of WQBELs in the new permit, EPA would point out the new permit retains the limits from previously-issued permits during the time period when the additional data is gathered. While these limits may not cover all the parameters of the new permit, additional time will be necessary to gather the necessary data to derive all the appropriate WQBELs. With regards to the recommendation that EPA somehow impose the WQBELs immediately (without the additional data to be gathered), EPA believes that in order to derive necessary and appropriate limits, the Agency needs to gather the appropriate data.

Regarding the intent of Part I.B.1.f.1 of the proposed general permit, this provision imposes the same WQBELs from existing permits while the additional data are being gathered; it is not intended to extend the terms of the existing permits.

The commenter had also recommended that the new general permit include the WQBELs from the existing permits. In response, the general permit does include the WQBELs from the existing general permit (see Table 5) which covers the majority of the platforms. Appendix B also lists the permit numbers for each of the existing individual permits. These permits and their WQBELs are readily accessible and Region 9 does not believe it is necessary to list all the WQBELs from these permits in the new general permit. The WQBELs in the individual permits are incorporated into the final general permit by reference.

(F) The commenter objected to Part I.A.6.c of the proposed permit which requires an NOI at least 180 days prior to permit expiration if a permittee wishes to continue discharge activity after the term of the permit. The commenter argued that NOI requirements must be set in the following permit in accordance with 40 CFR 122.28(b)(2)(ii).

Response: EPA agrees that operators discharging under a general permit that would follow the proposed permit will need to submit NOIs, five years from now, with information requirements to be determined by the next permit. The purpose of Part I.A.6.c of the current permit is to ensure that operators may qualify (if needed) for extended permit coverage pursuant to the APA under the 2004 permit. As noted above, EPA believes that the APA does provide for such extensions despite arguments to the contrary presented by the commenter.

EPA has modified the final general permit to indicate that an NOI submitted as the basis for an administrative extension would have to satisfy the information requirements of Part I.A.6.a of the permit. The commenter had noted that the contents of an NOI must be specified by the permit that a discharger is seeking to be covered by. 40 CFR 122.28(b)(2)(ii). Part I.A.6.c of the proposed permit had only indicated that an "NOI" would be required to seek extended permit converge, without specifying the information requirements. As such, the final permit was modified as noted above.

When a general permit is reissued in 2009, that permit will establish additional NOI requirements and deadlines to be followed by permittees, which will be open to public comment during the permit issuance process.

10) Comment: A commenter objected to Part I.A.5 of the proposed permit which would prohibit discharges of pollutants that are not part of the normal operation of a facility or ordinarily present in the waste streams, unless specifically authorized by EPA. The commenter argued that the phrase "unless specifically authorized by EPA" should be deleted since EPA did not have the authority to authorize such non-routine discharges without additional modification of the permit.

Response: EPA agrees with the commenter on this matter and the final permit deletes the phrase in question. The intent of the phrase was to address circumstances that could require a certain amount of judgment as to whether pollutants or operations would be considered part of the normal operation of a facility. However, EPA has not included this provision in the final

general permit.